IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

APPEAL FROM ORDER NO. 316 OF 2004.

M/s Bhimale & Sons. ..Appellants.

vs.

Mrs.Sarojinibai S.Pantasachiv & ors...Respondents.

Shri G.S. Godbole for the appellants.

Shri V.A. Thorat with S.S.Shah for the respondents.

CORAM: V.C.DAGA,J.
DATED: 12-08-2004.

P.C. :

. This appeal is directed against the judgment and order dated 3.1.2004 passed in Civil Appeal No.213 of 2002 by the 13th Ad-hoc Additional District Judge, Pune, whereby the judgment and decree passed in Reg.Civil Suit No. 465 of 1996 by the Civil Judge, JD (PMC) Court, Pune, came to be set aside and the matter came to be remanded to the trial Court with a direction to permit both the parties to lead evidence and decide the matter afresh; with further direction to dispose of the suit as expeditiously as possible preferably before 31st August 2004.

The Facts:

2. The facts giving rise to the appeal in nutshell are that the appellants filed a suit against the respondents seeking declaration that they have become

owners of the suit property; bearing S. No.19, Hissa No.1/A, situate at Kothrud, Pune ('suit property' for short); by adverse possession and that they were illegally dispossessed. The trial Court decreed the suit exparte and held that the appellants have become owners by adverse possession and they were illegally dispossed and that they are entitled to restoration of possession of the suit property.

3. Being aggrieved by the aforesaid judgment, order and decree of the trial Court, the appellate jurisdiction of the lower appellate Court was invoked by the respondent herein.

4. The lower appellate Court was pleased to reverse the decree holding that the appellants failed to prove that they have become owners by adverse possession. The lower appellate Court, for want of evidence on record, rejected contention of the appellants that the respondents had knowledge of their possession or that their alleged adverse possession was with due notice to the true owner. It was further held that it was the duty of the trial Court to consider the documentary evidence in the form of 7/12 extracts. The lower appellate Court was also pleased to hold that the trial Court did not properly consider that tenants of respondent Nos. 1 to 3 viz., Nimbalkars were in possession of the suit property and not the

appellants. The lower appellate Court also held that the trial Court should have weighed and appreciated evidence in its proper perspective. It was also held that the evidence on record was not sufficient to hold that the plaintiffs have perfected their title by way of adverse possession.It was also held that nowhere in the plaint it is mentioned by the plaintiff as to who is supposed to restore possession or from whom plaintiff is supposed to take possession of the suit property. Thus, lower appellate Court found that the judgment of the trial Court was too vague and perfunctory. The lower appellate Court was thus pleased to set aside the judgment and decree of the trial Court and remand it for fresh trial. This order of the lower appellate Court is the subject matter of challenge in the present appeal from order.

Consideration:

5. At the outset, it is necessary to go through the recent judgment of the Apex Court in the case of **Narayanan vs.Kumaran & ors. (2004) 4 SCC 26** wherein the Apex Court was pleased to hold that whenever appeal is preferred under Order 43 Rule 1 clause (u) of the Code of Civil Procedure from order of remand, such appeal must be in compliance with the requirements of section 100 and must be confined to the substantial question of law having bearing on the

order of remand. The Court cannot go into excruiciating details of facts and appreciate evidence. In view of the judgment of the Apex Court in Narayanan's case (supra),Appeal from Order arising from the order of remand has to be in compliance with requirements of section 100 of C.P.C. If ratio of this judgment is applied, then it is necessary to first examine as to whether the judgment of the lower appellate Court gives rise to any substantial question of law. So far as present appeal is concerned, in my opinion, no substantial question of law is involved warranting admission of this appeal.

6. The main ground of attack is directed against the powers of the lower appellate Court to remand this matter to the trial Court. The said challenge is misplaced in view of the recent judgment of the Supreme Court in the case of **REMCO Inds. Workers House Bldg.Co. vs. Cop. Society vs. Lakshmeesha M.and ors. AIR 2003 SC 3167,** wherein Apex Court has ruled that powers of the appellate Court are not inhibited by the acts or omissions of the parties. Rule 25 of Order 41 of the Code of Civil Procedure empowers the appellate Court to frame an issue, and remit it for trial, which has been omitted to be framed and tried by the trial Court and which appears to the appellate Court essential to the right decision of the case. Rule 23-A of Order 41 introduced by the

CPC Amendment Act No.104 of 1976 w.e.f.1.2.1977 confers powers on the appellate Court to remand whole suit for retrial. Following the law laid down by the Apex Court, in my opinion, no fault can be found with exercise of powers of remand under Orders 21 and 25, Rule 23A of the C.P.C. exercised by the lower appellate Court. This ground of challenge, therefore, must fail.

7. The second ground of challenge to the impugned order is directed against right of the respondents to prosecute the suit and/or defend this appeal in view of the instrument of transfer or conveyance executed by the respondents on 11th May, 1996 in favour of third party i.e. M/s Naiknavare and Associates ('Purchasers' for short), who is not party to the present litigation.

8. Shri Godbole, learned Counsel appearing for the appellant submitted that in view of the transfer of suit property, plaintiffs- respondents have lost their right, title and interest in the suit property as such it is not open for them either to contest suit or defend this appeal. In my view, this submission is also misplaced in view of the fact that, while transferring the suit property by registered instrument of conveyance, respondents- plaintiffs, who are vendors or transferors have unequivocally declared

and assured the vendees/purchasers at the time of sale that they are owners of the property survey No.19 H.No.1A, situate at Kothrud, Pune. Therefore, it is obligatory on their part for all time to come to defend and establish their title and to show that they were absolute owners of the suit property till it was transferred. Any defect in their title may invite action at law against them. In the event of failure on their part to prove their good title, they can be sued for damages or any other action in law can be initiated against them at the instance of the purchasers. It is thus necessary for the vendor to defend his title. In this view of the matter, I do not find any substance in the submissions made by Shri Godbole that the respondents have no right defend this appeal or defend the suit filed against them.

9. The impugned order of remand has been passed after considering the oral and documentary evidence on record upon due satisfaction that the title by adverse possession has not been established by the plaintiffs. The view taken by the lower appellate Court is a reasonable and possible view. No other substantial question of law was raised or argued.

10. In the above premises, considering totality of the facts and circumstances of the case and considering the submissions made, I do not think any

case is made out to interfere with the impugned order. No substantial question of law is involved.

11. In the result, appeal is dismissed in limine with no order as to costs.

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